

Testimony Before the Presidential Commission on the Supreme Court of the United States

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**In Support of a Congressional Statute Establishing an Eighteen-Year Limit on Active
Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-
In**

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Distinguished Co-Chairs and Commission Members: Thank you for inviting me to share my views on the Supreme Court in general and on time limits for Court members in particular.

I

In a bipartisan op-ed published in the *Washington Post* on August 9, 2002, Steven G. Calabresi, the co-Founder and co-Chair of the Federalist Society, and I floated the idea that each justice should do eighteen years of full and active service on the Court and should thereafter have a different portfolio of judicial responsibilities. The bipartisan co-authorship of this 2002 op-ed was purposeful. The eighteen-year idea was then, and remains today, neither Left nor Right, neither Blue nor Red. I was then and remain today a mainstream Democrat and Steve was then and remains today a mainstream Republican. For example, in 2000 I voted for Al Gore, whereas Steve voted for George W. Bush. In 2016 I voted for Hillary Clinton, Steve for Donald Trump.

When I first publicly embraced the eighteen-year idea, a Republican sat in the White House, Republicans controlled the House, and the Senate was almost evenly divided. Today, the partisan alignment is almost exactly the opposite—a Democrat sits in the White House, Democrats control the House, and the Senate is almost evenly divided. Yet I still consider the eighteen-year idea a good one.

Indeed, in the many years since I began mulling the eighteen-year idea, I have become even more persuaded that the root idea is a good one. I have over the years tweaked and modified various details of my envisioned reform, *but I remain convinced that some version of the eighteen-year idea can and should be embraced by Congress in a simple statute.*

Ideally, this statute should itself be bipartisan, drawing support from leaders of both parties and featuring a proper phase-in that respects the settled expectations of the current justices and avoids any appearance of a partisan grab reminiscent of the Midnight Judges Act of 1801. At the end of my written testimony, I have included a short Appendix (Appendix A) sketching out in more detail how my eighteen-year idea might best be implemented in a fashion that I believe would be an entirely constitutional exercise of congressional power to structure the Court pursuant to Congress’s explicit power under the Article I Necessary and Proper Clause.

That Clause, of course, vests Congress with authority to pass proper laws implementing powers vested by the Constitution in “the Government of the United States, or in any Department or Officer thereof.” Ever since the Founding, Congress has used this Clause to properly prescribe the size and shape of various executive departments; the powers and duties of various executive officers; the size, shape, and responsibilities of the Supreme Court; the powers and duties of its members; the rules of procedure and evidence operative in the Supreme Court, the timing of Supreme Court sittings; and myriad other matters of similar scope. In perfect harmony

with this well-settled pattern of Congressional legislation, Congress should in the near future properly prescribe a lifetime duty roster for Supreme Court justices.

A quick note on terminology.¹ My specific eighteen-year idea and its close cousins—that is, variations of this idea that have been embraced in recent years by a wide range of legal scholars across the political spectrum²—have often been described as proposals for “term limits” for justices. Indeed, I myself have frequently used this phraseology and may well lapse into this locution in informal future conversations. Nevertheless, my proposal is, strictly speaking, not a limit on the official *term* of any given justice. Each justice is entitled under the Constitution to serve a life term in the federal judiciary—to serve “during good behavior,” to use a more technical formulation—and I do not propose otherwise. Each justice is entitled to be paid for life/good behavior and I do not propose otherwise. Each justice is allowed to claim the official title of “Supreme Court Justice” for life/good behavior and I do not propose otherwise. I simply propose that we modify the *manner* in which each justice serves on the Court for life/good behavior. Put differently, my proposal merely modifies, and in a purely prospective way, the *duty roster* accompanying the official office of Supreme Court Justice.

Under my proposal, each justice would be a justice in active service—a member of the Court’s “front bench,” so to speak, with the same basic responsibilities as a typical justice in the

¹ On the value of proper terminology to reduce the risk that casual observers will be “faked out” by imprecise labels, see Akhil Reed Amar, “The Five Legged Dog,” *The American Lawyer*, September 1999.

² See, e.g., James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court With Staggered, Nonrenewable Eighteen-Year Terms*, 90 Va. L. Rev. 1093 (2004); Roger G. Cramton, *Reforming the Supreme Court*, 95 Cal. R. Rev. 1313, 1323 (2007) (“eighteen years followed by lifetime service in a lower federal court”); *Four Proposals for a Judiciary Act of 2009* (open letter endorsed by dozens of eminent scholars including Vikram Amar, Barbara Babcock, Jack Balkin, Paul Carrington, Roger Cramton, Dan Meador, Frank Michelman, Paul Mishkin, Robert Nagel, L.A. Scot Powe Jr., Jefferson Powell, Judith Resnik, Chris Schroeder, David Shapiro, and Peter Strauss).

system today—for eighteen years. Thereafter, each justice would serve in a relaxed-service capacity, with a different set of daily Supreme Court responsibilities. A relaxed-service justice—whom we might also call an “emeritus justice”—would not routinely sit with active-service justices en banc; but would be available to do so in cases when the Court is short staffed—when (because of death or illness or resignation or recusal or the like) nine active-service Justices are not available for service. An emeritus justice would devote most of her daily attention to Court-related administrative, ceremonial, educational, public-relations, circuit-riding,³ and docket-management functions, following a more detailed set of rules to be promulgated and from time to time revised by the active-service justices.

Strictly speaking, perhaps we should call my idea not “term limits,” but “time rules.” In its ultimate constitutional logic, my proposal is broadly analogous to a hypothetical statute providing that no justice should speak for more than, say, five minutes in any hour-long oral argument. (This hypothetical oral-argument law is also best understood not as a term limit but as a time rule.)

II

In the April 28, 2021 episode of my weekly podcast with Dr. Andrew Lipka, *Amarica’s Constitution*, I listed 18 distinct reasons supporting my particular version of the idea of 18 years of active Court service, followed by a lifetime of relaxed Court service. Commission members

³ Note that if circuit-riding were deemed problematic, it need not be included in the bipartisan reform statute. A sensible statute could work just fine without this element—or indeed, without any particular element or combination of elements in my envisioned portfolio for emeritus justices.

and other interested citizens may wish to listen to this podcast in its entirety. (See <https://akhilamar.com/podcast-2/#eighteen>)

Here, in brief, were my “18 arguments for 18 years”:

1. The status quo of lifetime active service, when combined with a partisan arms race, encourages each of our two major political parties to appoint unduly young and unseasoned jurists to the Court, in the hopes of entrenching the party vision on the Court for as many years as possible.
2. At the other end of the life cycle, the status quo allows full service of justices who are too old, whose arteries have literally hardened and who are not at their prime. (Historically, most justices have not done their best work in their superannuated years.)
3. The current system creates the possibility of too long a lag time between initial appointment and current judgment. The most senior active justices may be wildly out of touch with the nation’s evolving mood, because these justices were appointed long ago (even if they are still relatively young and spry and their arteries have not hardened). This lag time is particularly problematic for younger Americans who were not even voters when many current justices were selected. Many of America’s younger generation lack a close emotional connection to the Court, in part perhaps because of the long lag time. The reform statute caps this lag time at 18 years for the Court’s most important function—decision-making in en banc cases.
4. The current system enables justices to strategically and politically time their resignations. This is a less attractive model of judicial independence. Currently, some justices act *politically* when they time their exits.
5. Eighteen is a “magic number” enabling regular and steady replacement, à la the Senate. The Senate’s staggered replenishment system adds a new third every two years. The eighteen-year-active-service plan adds a new ninth every two years.
6. Eighteen is a “magic number” in a second and distinct way: Appointment power is regularized and smoothed out across presidencies and across quadrennial presidential elections; each president can count on two appointments, and this smoothing makes replenishment less arbitrary, random, and capricious.
7. Relatedly, regular replenishment of the front bench makes it easier for voters to think about the Court’s future every presidential election without awkward and indeed ghoulish speculation about the life expectancies and health prognoses of individual sitting justices.
8. Shortened terms of active service will reduce the stakes—and the temperature—of currently overheated Court confirmation battles.
9. Shortened terms of active service will increase judicial humility.
10. Replenishment every odd year regularizes appointments *within* each presidential term, with half the active justices chosen pre-midterm and half post-midterm. The

opening up of vacancies in odd years further reduces the political temperature of Court confirmation battles by staging these battles in nonelection years.

11. An eighteen-year cap on active-service brings the U.S. Supreme Court model into closer alignment with the most admirable state supreme court systems, almost none of which features active service for life. The federal government can and should learn from the lessons of states, the proverbial laboratories of American democratic experimentation.
12. Ditto on the comparative international front: Almost no other modern democracy in the world has a lifetime model of active service for its apex court. America as a whole can learn from the experiences of the world's other notable democracies.
13. Unlike current reform proposals to "pack the Court" the eighteen-year proposal is not partisan and is unlikely to spiral out of control when party control shifts in Washington DC at some point in the future.⁴
14. The eighteen-year proposal not only eliminates the occasional or regular *reality* of politically timed retirements; it eliminates the *public perception* of politics in judicial retirements—a perception that may *wrongly* exist when Justice X in fact retires nowadays for entirely personal reasons, but a perception that adds to current public cynicism about the Court.
15. Under the eighteen-year plan, every active justice is slated to serve as chief justice in his/her last two years of active service. This too, evens out power across presidents and eliminates the current lumpiness giving some presidents, for purely accidental reasons, more power than others to pick the Court's chief.
16. Rotation of the chief justiceship equalizes power *within* the Court. Relatedly, associate justices will not have incentives to pander to the president in the hopes of one day being nominated (by a president, of course) to become chief justice. Even if associate justices never in fact pander, the mere public perception that some justices might well be auditioning to be chief is undesirable.
17. Chief justices will be those who clearly understand the Court, having typically served on the active bench for the previous sixteen years, and having received, one would expect, special training by their predecessor chief justice.
18. Circuit duty of emeritus justices could help reconnect the Supreme Court with lawyers and judges in the hinterlands—a nice echo of the original vision of the Court as implemented by the Judiciary Act of 1789.

⁴ On reflection, this podcast point was a bit of a cheat: It did not identify an improvement on the status quo, but merely an advantage over another widely discussed approach to Court reform. But here is a true improvement, which the podcast did not count as a separate virtue: The eighteen-year proposal minimizes the likelihood of a short-staffed, evenly divided court. Whenever one of the active nine justices is unavailable, a reduced-service emeritus justice can easily pinch hit.

III

As previously mentioned, I have included at the end of my written testimony a more detailed description of my proposed reform package. See Appendix A. The details will doubtless prompt specific questions that merit further conversation. For now, I conclude by explaining why this proposal is, in my view, easily and obviously constitutional, able to be effectuated by a simple congressional statute and not requiring a constitutional amendment of any sort.

As mentioned earlier, the Constitution expressly and purposively vests Congress with broad power to legislate rules structuring the executive and judicial departments. This power is of course not unlimited. Congressional legislation must be “proper.” It must comport with the Constitution’s letter and spirit—including the specific letter and spirit of Articles II and III.

Consider for example two hypothetical Congressional laws that in my view would be constitutionally improper.

First, imagine a Congressional statute purporting to dictate to the Court how to construe a particular constitutional provision or how to construe the Constitution in general. Such a law would violate the Court’s power to “say what the law is,” to quote *Marbury v. Madison*—the power, that is, of the Court to determine for itself, in its own independent judgment, what the Constitution in fact means.

True, Congress has broad power to dictate to the Court how to construe a particular federal statute and how to construe federal statutes generally. But this power is largely derivative of the power to enact federal laws themselves. If a law can be written broadly, how is this different from a law written in rather more ambiguous language but featuring a clause telling the Court to “construe this law broadly”? Still, the power of Congress to dictate to the Court rules of

statutory construction, whether local or global, is not infinite. The Court may at times read the Constitution itself to require that certain things must be said very clearly and expressly by Congress, via a super-clear statement. If the Court believes that the Constitution itself requires or invites such a clear-statement rule, Congress does not have carte blanche to direct the Court to ignore its own constitutional beliefs in deciding the cases that come before it.

More generally, Congress lacks carte blanche to tell the Court how to construe the *Constitution*, either locally or globally. Congress itself did not create the Constitution, cannot change the Constitution at will by ordinary legislation, and is not the sole master of constitutional meaning. The Congress is of course free and indeed obliged to construe the Constitution for itself in many situations; and Congress is also free to express its understanding of constitutional meaning. The Court may well choose to give weight to Congress's good-faith judgment of constitutional meaning. But Congress cannot by law require the Court to follow Congress's interpretation of constitutional meaning.

This basic principle, deducible from the Constitution's structure, has been reinforced by important rulings of the Court itself, most notably in the 1871 case of *United States v. Klein*. In that case, the justices correctly held that Congress lacked power to dictate to the Court the meaning and scope of the president's pardon powers under Article II.

Second, imagine a congressional statute purporting to restructure the Court's decision-making by forbidding the Court to strike down federal legislation unless the Court vote is at least 6-3. Any statute that gave a jurist brandishing a mere congressional law a weightier vote than a dueling jurist wielding the Constitution would improperly invert the clear prioritization of legal norms established by the Article VI supremacy clause, which of course privileges the Constitution over a mere Congressional statute. Put differently, thanks to the letter and spirit of

the supremacy clause, Congress may pass no law giving any judge who sides *against* a constitutional claim more weight than a judge who sides *with* a constitutional claim.

But my proposed eighteen-year time rule is entirely different from improper laws of the sort I have just described. The proposal is deeply respectful of the constitutional principle of judicial independence. Indeed, because this proposal would discourage mature justices from timing their resignations in political or partisan ways, it would instantiate a *superior* version of independence compared to the status quo. Unlike the law in *Klein*, which interfered with powers directly and explicitly vested by the Constitution itself in the office of the President, my proposal does no violence to the office of Supreme Court Justice as outlined in the Constitution. The Constitution vests no particular power in any *individual* judge or justice to hear this case or that one, apart from the power of the chief justice to preside at presidential impeachments. My proposal in no way intrudes upon that power (even though it does revise the process by which a given jurist becomes the nation’s chief justice).⁵ My proposal does not retroactively deprive any current member of the Court of any vested privilege; and its structure provides the same rules for presidents of both parties, going forward: Under my proposal, every president henceforth will nominate a new justice in year one and in year three of every presidential term.

In essence, the eighteen-year time limit would simply be a proper law structuring and shaping the Supreme Court and the office of Supreme Court Justice—constitutionally

⁵ My proposal that the senior-most Associate Justice should automatically become Chief—typically in his/her last two years of active service prior to becoming an emeritus justice—broadly tracks the statutory rules for Circuit Courts today and the practice of many foreign Supreme Courts. On the former, see 28 USC sec. 45 (a) (1) (“The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who are sixty-four years of age or under; have served for one year or more as a circuit judge; and have not served previously as chief judge.”)

indistinguishable from a vast number of earlier laws shaping and structuring the Supreme Court, lower federal courts, executive departments, and various Article II and Article III offices.

For example:

Beginning in 1789, in legislation signed by George Washington himself, Congress has prescribed—and over the ensuing years has from time to time modified—the number of justices, the Court’s overall jurisdiction, and the duty rosters of various executive branch officials. *How is the envisioned duty roster at the heart of my eighteen-year proposal any different as a matter of constitutional principle?*

Notably, the First Congress prescribed when, where, and how the justices should sit en banc, including a rule prescribing that any four of the Court’s initial six members would compose a proper quorum for the Court’s en banc decisions.⁶ *How is it any different if today’s Congress says that the Court’s proper en banc composition, as a rule, involves its pre-emeritus justices as distinct from its emeritus justices?*

Congress likewise, in its earliest statute on the judiciary—the landmark Judiciary Act of 1789—prescribed that the proper duty of a Supreme Court justice was to ride circuit at certain times. Although some modern scholars have raised technical questions about the constitutional propriety of circuit riding, this was *an enormous and defining feature* of the celebrated Judiciary Act of 1789, enacted by the First Congress, which contained many leading framers and ratifiers of the Constitution, and signed into law by none other than George Washington. Every early justice in fact rode circuit; none openly resisted circuit-riding on the grounds that this element of the job was unconstitutional. Circuit riding built squarely on earlier practices and traditions in various states and colonies, and in Britain—traditions of assize courts and nisi prius, in which the

⁶ Judiciary Act of 1789, 1 Stat. 73, section 1.

jurists of a legal regime's highest court sat individually or in smaller groups in courts across the countryside, bringing justice to every man's door. If this system combining local sittings and centralized en bancs was good enough for George Washington and James Madison and John Marshall and Joseph Story, it should surely be good enough for us. Modern scholars who are squeamish on this point should yield to the great weight of early liquidation and utterly settled practice. *If the First Congress could say that a given justice must sit en banc in month X and ride circuit in month Y, why cannot today's Congress say that a given justice must sit en banc in years 1-18 and ride circuit thereafter? In any event, if circuit-riding were thought problematic for Emeritus Justices, this particular part of the reform package can simply be eliminated.*

In laws stretching back to the Washington presidency, Congress has likewise prescribed various rules of evidence and procedure to be followed by the Supreme Court and other federal courts. *Surely the eighteen-year time rule can be understood as structuring the **procedure** of the Court—that is, its basic manner of **proceeding and conducting itself** as distinct from its substantive pronouncements of the legal rights and duties of proper litigants who come before the Court.*

There is virtually no doubt that Congress could legislate proper rules for Supreme Court ethics, including rules specifying situations requiring recusal. *How is a rule prescribing en banc recusal in general for any jurist who has already heard her fair share of en banc cases any different from all sorts of other recusal rules that Congress might properly adopt? Why cannot a rule limiting pre-emeritus front-bench service to a fixed number of years be justified as a simple judicial-ethics regulation discouraging politically timed and partisanship-tinged retirements?*

A final point worth reiterating from my April 28, 2021 podcast is that the eighteen-year reform proposal would bring the U.S. Supreme Court into closer alignment with some of

America's most distinguished state court judiciaries featuring long fixed-terms of active service. State constitutions of course differ from the federal Constitution in important ways. Still, the wide popularity of state judicial time limits for service is one reassuring factor in support of the basic propriety and common sense of the eighteen-year proposal. In its deep design (and unlike several other high-profile reform proposals currently in the air), the eighteen-year proposal is entirely and self-consciously in keeping with the American Way.

Appendix A: More Detailed Sketch of the Amar Reform Plan

Congress should enact language along the following lines:

The Supreme Court shall henceforth consist of four classes of Justices: Legacy Justices, Regularized Justices, Replacement Justices, and Emeritus Justices. All Legacy, Regularized, and Replacement Justices shall be considered Justices in *active service*.

All Justices in active service on the date of this law's enactment are hereby designated Legacy Justices. Their service, tenure, rights, and responsibilities on the Court shall remain unchanged, provided that at any time, a Legacy Justice may elect to take Emeritus status by becoming a Emeritus Justice.

Regularized Justices shall be eligible to receive good-behavior commissions that commence no sooner than July 1, 2023, and every two years thereafter, one regularized commission per every odd year. No president may nominate a Regularized Justice prior to March 1 of the commissioning year. Regularized Justices shall in all respects be equivalent to Legacy Justices except as follows: Each Regularized Justice who wishes to remain on the Court must take Emeritus status no later than eighteen years after his or her commission-eligible July 1 date.

If any Justice in active service shall take Emeritus status or leave the Court at a time when the total number of remaining active-service Justices shall be nine or more, no Court vacancy shall thereby be created. If, however, any Justice in active service shall take Emeritus status or leave the Court at a time when the total number of remaining active-service Justices shall be less than nine, the vacancy may be filled, upon presidential nomination and Senate confirmation and presidential issuance of a good-behavior commission, by a Replacement Justice. This Replacement Justice may continue

in active service until displaced by the commissioning of a Regularized Justice in due course whose addition to the Court brings the total number of remaining active-service Justices back to nine; provided that in no event may any Replacement Justice continue in active service for more than eighteen years. If at any time there shall be more than one Replacement Justice, the most junior Replacement Justice shall be the first to be displaced, the next-most junior shall be the next to be displaced, and so on. At the end of his or her active service, a Replacement Justice may elect to remain on the Court by taking Emeritus status.

Whenever the Chief Justice shall take Emeritus status or leave the Court, the position of Chief Justice shall devolve upon the senior-most Legacy Justice or Regularized Justice.

Whenever the affiliates of any political party shall constitute a majority of Justices in active service, no additional members of that party may join the Court as Regularized or Replacement Justices until the affiliates of such party shall cease to constitute a majority of Justices in active service. Party affiliation for this purpose shall be determined by party membership on the date of presidential nomination.

Except as otherwise provided for herein, all Justices in active service shall perform the same functions as do the Legacy Justices on the date of this law's enactment. Emeritus Justices shall be eligible to participate in case decisions only when the Court is short-staffed—to wit, only when in any given case the number of active-service Justices shall fall below nine as a result of vacancy, disability, or recusal. Emeritus Justices shall also be eligible to perform ancillary administrative, ceremonial, educational, circuit-riding, and docket-management functions as shall be outlined in rules to be promulgated and from time to time revised by the active-service Justices.

Appendix B: Additional Reform Ideas Worthy of Discussion

1. Enlarging the lower federal judiciary: 200 new judges from 2021-25; 200 more from 2025-29.
2. An Ethics Code for Supreme Court Justices.
3. Clerkship reform—each justice should have at least one law clerk who previously served as a clerk to a judge of the opposite political party. Each federal appellate judge should have at least one law clerk of the opposite political party.
4. Live radio broadcasts of all Court oral arguments (either via a statutory mandate or by custom/practice encouraged by public presidential jawboning).

The big ideas here: Federal judges in general are persons of competence and honor. There should be more federal judges, not less. Expansion of the federal lower federal judiciary will accelerate demographic diversification of the bench. We need more trials and more jury trials in particular. Jury trials are actually good for democracy and public service. Judicial expansion should be sequenced so that next administration will also get many new slots—thus blunting any concern that this is simply a Democratic Party grab. Each

Supreme Court justice and each federal appellate judge should have input/advice from at least one clerk of the opposite political party.